

Federal Court



Cour fédérale

Date: 20240919

Docket: T-329-24

Citation: 2024 FC 1474

Toronto, Ontario, September 19, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

ROGER MALONEY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Roger Maloney [the Applicant], is a self-represented litigant who seeks judicial review of a second level review decision dated February 12, 2024 [the Second Decision] of a delegate of the Canada Revenue Agency [CRA] denying the Applicant's request for taxpayer relief from the Minister of National Revenue [the Minister].

[2] For the reasons that follow, I find that the Applicant has been denied procedural fairness in the rendering of the Second Decision. The CRA ignored repeated requests by the Applicant for documents he required to prepare for the second level review. It is axiomatic that the Applicant cannot know the case he has to meet and meaningfully respond without knowing all that the CRA considered in its first level review. This was a breach of procedural fairness warranting this Court's intervention.

[3] I also find that the Second Decision is unreasonable. Accordingly, this application for judicial review is allowed.

II. The Legislative Framework

[4] Subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) as amended [the *Act*] gives the Minister broad discretion to accept or reject a taxpayer's request for a waiver or cancellation of penalties and interest otherwise payable under the *Act*:

Waiver of Penalty or interest

220(3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and

Renonciation aux pénalités et aux intérêts

220(3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition

notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[5] The CRA currently follows the Information Circular 07-1R1, entitled "Taxpayer Relief Provisions" [the Guidelines], when it is applying subsection 220(3.1) of the ITA.

[6] Under paragraph 23 of the Guidelines, there are three categories of circumstances that justify a taxpayer's inability to satisfy a tax obligation and upon which the Minister may grant relief from penalties and interest: (a) extraordinary circumstances beyond a taxpayer's control such as disasters, civil disturbances, serious illness or accident (Guidelines at para 25); (b) actions of the CRA including processing delays, delays in providing information, and undue delays in resolving an objection or completing an audit (Guidelines at para 26); and (c) inability to pay or financial hardship (Guidelines at para 27). Notably, the Minister may grant relief even if the taxpayer's circumstances do not fall into these categories (Guidelines at para 24).

III. Facts

A. *The Offshore Tax Scheme*

[7] In 2003, the Applicant became involved in an offshore scheme [the Tax Scheme]. The person running this scheme, Charles Morrison [Morrison], was ultimately convicted of fraud by the Manitoba Securities Commission.

[8] Between 2003 and 2005, the Applicant invested approximately \$213,000 through Morrison. These funds were refunds from the CRA after Morrison filed adjusted returns for the Applicant for past years.

[9] In 2006, the CRA notified the Applicant that the investment program had been a scam and that all deductions that had been claimed for his 2000 through 2003 returns were being disallowed.

B. *The Applicant's Debts and Tax History*

[10] The Applicant was reassessed for the 2000, 2001, 2002 and 2003 taxation years, and the losses he claimed were disallowed. He filed a Notice of Objection on July 24, 2007, which also included a request that he not be charged on arrears in the event that he was unsuccessful with his objections.

[11] Over seven years later on February 3, 2015, the assessments were upheld and his Objection was denied.

[12] The Applicant appealed the assessments relating to his 2000, 2001, 2002 and 2003 taxation years to the Tax Court of Canada on June 3, 2015. He appointed Morrison as his representative, but the appeal was dismissed after Morrison took no action on the appeal.

[13] The Applicant accrued debt in the form of arrears interest in respect of the taxation years 2000 through 2003.

C. *The Applicant's Request for Taxpayer Relief*

[14] The Applicant submitted a formal request for taxpayer relief dated September 7, 2018 to obtain relief from late-filing penalties and arrears interest assessed against the Applicant on his 2000, 2001, 2002 and 2003 taxation years [the Request for Taxpayer Relief or the Request].

[15] According to the CRA, as of January 31, 2024, the Applicant has an outstanding balance of \$478,166.27 for the 2002, 2003, 2008 and 2009 taxation years, with approximately \$3,671.63 occurring in interest charges each month.

D. *The First Review*

[16] More than three years after filing his Request for Taxpayer Relief, the Applicant received a letter dated November 26, 2021, from an officer of the CRA denying the Request [the First Decision]. The basis for the First Decision was that:

In reviewing the facts and circumstances of this case, I have not concluded you were reasonably prevented from addressing your tax obligations with the CRA due to circumstances beyond your control. A review of your account has not revealed any undue delays or errors caused by the actions of the CRA.

[17] As the Applicant notes, the First Decision was not accompanied by a Taxpayer Relief Fact Sheet [Fact Sheet] like that which accompanied the Second Decision, nor were any case notes provided.

E. *The Applicant's Request for Documents Related to the First Decision*

[18] The Applicant sent two letters to the CRA on December 30, 2021 and October 6, 2022 seeking disclosure of internal correspondence and CRA notes. When the Applicant did not receive the documents he had requested, he wrote to the Minister directly by letter dated December 11, 2022. The Applicant attached his prior requests and emphasized that the information he was seeking was “essential” to him and was needed by him in order to finalize what he considered to be an appeal of the First Decision.

[19] The Minister forwarded his letter to the CRA who considered the Applicant's letter as a request for a second level review.

F. *The Second Review*

[20] The manner in which the second review was conducted is set out in the affidavit [the Affidavit] of the Minister's delegated authority who made the Second Decision. According to the Affidavit, the second level review starts with a review of the file to date by the Taxpayer Relief Officer assigned to conduct the second level review [the Second Reviewer].

[21] The Second Reviewer also considered documents submitted by the Applicant which consisted of his letters dated:

1. **September 7, 2018** to the CRA which includes the Applicant's Request for Taxpayer Relief form with accompanying letter of the same date with submissions which were prepared by tax consultants hired by the Applicant [the Farber Submissions].

2. **December 11, 2022** to the Minister seeking assistance in getting disclosure from the CRA.
3. **August 21, 2023** to the CRA which includes excerpts from a summary of the Taxpayer's Bill of Rights and a document entitled "Fruitless quest to acquire information from CRA" summarizing the Applicant's request for file notes related to his dispute with the CRA from 2003 to 2008 as well as documents related to the "Union Cal national group" as referenced in the CRA note disclosed to him on December 20, 2022.
4. **November 23, 2023** to the Second Reviewer enclosing his financial information, payment history and correspondence regarding his Access to Information request. The Applicant also made submissions alleging that the exorbitant interest charges being levied against him were caused by: (i) "extreme delays" in dealing with his Notice of Objection and Taxpayer Relief Request; and (ii) the deliberate decision by CRA staff to delay dealing with his case [the Applicant's Delay Submissions].

[22] The Second Reviewer prepared a 14-page Fact Sheet which shows her consideration of the factors set out in the Guidelines. According to the Affidavit, in preparing the Second Review Fact Sheet, the Second Reviewer also considered: tax year transaction records; collections ACSES (Automated Collections and Source Deductions Enforcement System) notes; the Applicant's statement of income and expenses and assets and liabilities; and notes made by the Second Reviewer in the Case Management System.

[23] The Second Reviewer made a recommendation to the Minister's delegated authority who agreed with her recommendation.

G. *The Second Decision*

[24] The Second Decision states that the Second Reviewer conducted a second independent review of the Applicant's Request for Taxpayer Relief and grants partial relief to the Applicant:

1. The Minister cancelled the arrears interest assessed on the 2002 and 2003 tax years from February 2, 2015 (the date the debt was reinstated) to the date of the Second Decision;
2. The Minister did not cancel interest accrued on arrears prior to February 2, 2015. Relief in respect of these amounts was denied as the Applicant had the option to make payments towards his tax debt and chose not to do so.

IV. Preliminary Issues

[25] First, pursuant to Rule 303(2) of the *Federal Courts Rules* SOR/98-106, the style of cause shall be amended to reflect the correct respondent, the Attorney General of Canada.

[26] Second, the Respondent argues that the Applicant's Record contains improper evidence, as it contains material that was not before the Second Reviewer. The evidence consists of 25 exhibits [the Exhibits] attached to the Applicant's supporting affidavit along with commentary.

[27] It is trite law that judicial review of an administrative tribunal's decision should be based on the record that was before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20 [*Access Copyright*]). The recognized exceptions to this rule include evidence that is: (i) general evidence of a background nature that is of assistance to the Court; (ii) relevant to an alleged denial of procedural fairness by the decision maker that is not evident in the record

before the decision maker; or (iii) demonstrative of the complete lack of evidence before a decision maker for an impugned finding (*Access Copyright* at para 20). The Respondent submits that none of these exceptions apply to the new evidence, though he conceded at the hearing that the case law can be treated as part of the Applicant's authorities.

[28] I have considered the exceptions recognized in *Access Copyright* and find as follows:

- a) Exhibits 4, 5, 6, 7, 8, 9, 11, 15, 16, and 17 pre-date the Second Decision and relate to the history of the case and therefore fall under the general background exception and shall be allowed. A broad view of relevance is appropriate, given that the Second Decision refers to actions taken by the Applicant that also pre-date his Request for Taxpayer Relief.
- b) Exhibit 21 is a copy of an alleged "secret deal" given by the CRA to KPMG clients and shall be allowed as it is arguably relevant to the Applicant's argument that he was denied procedural fairness because he was not treated equally by the CRA (i.e., an allegation of bias), and the allegation is not evident in the record before the decision maker. However, Exhibits 18, 19, 20, and 22, which are articles related to the KPMG "secret deal" shall be excluded as they are not evidence.
- c) The summary of the Taxpayer Bill of Rights (Exhibit 23) is already part of the record as a document considered by the Second Reviewer.
- d) Exhibit 24 includes the Applicant's letters to the CRA, the Minister and the history of his various requests for information. These are relevant to the Applicant's argument that he was denied procedural fairness in not having received documentary disclosure of the documents from his tax file. However, these letters go beyond background information, and in any event are largely duplicative of the documents that are already in the record as documents reviewed by the Second Reviewer. Accordingly, this Exhibit and the accompanying commentary shall be excluded from the record.
- e) The following Exhibits are irrelevant to whether the Second Decision is reasonable and procedurally fair and shall be excluded: Exhibits 1, 2, 3, 10, 13, 14 and 25.

- f) The Applicant's commentary with respect to the Exhibits that have been allowed shall be treated as part of the Applicant's submissions.
- g) The Applicant's commentary on the Respondent's written answers to cross-examination on the Respondent's Affidavit shall be excluded.

[29] Since there is considerable duplication in the record, which is difficult to navigate, it is important to emphasize that any document that was considered by the Second Reviewer should form part of the record irrespective of the above findings.

V. Issues and Standard of Review

[30] Based on the Applicant's written and oral submissions, the Applicant's complaints can be restated as follows:

- A. It was procedurally unfair for the CRA not to have provided proper disclosure of the documents related to the First Review in advance of the Second Review;
- B. The Second Decision is unreasonable;
- C. The CRA was biased in its treatment of the Applicant; and
- D. The CRA breached the Taxpayer Bill of Rights.

[31] Issues of procedural fairness are reviewed on a standard akin to correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at paras 34-35 and 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court looks to ensure that administrative decisions are made using a fair, open and appropriate procedure that provides an opportunity for those affected by the decision to understand the case

they have to meet and put forward their views and evidence fully for consideration by an impartial decision maker (*Canadian Pacific* at para 41).

[32] The standard of review of the Court's consideration of the merits of the Second Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 23). While the court must show deference to the administrative decision maker, it may intervene if it finds the decision to be unreasonable, including by reason that the decision maker disregarded the law or fundamentally misapprehended the evidence (*Vavilov* at paras 108, 125 and 126), or where the decision lacks the hallmarks of justification, intelligibility and transparency to those who are subject to it (*Vavilov* at para 99).

VI. Analysis

A. *Was the Applicant Denied Procedural Fairness?*

[33] After the First Decision dated November 26, 2021, the Applicant made three requests (December 30, 2021, October 6, 2022 and December 11, 2022) for the documents in his file dating back to 2007 as well as internal documents upon which the First Decision was made, including any documents that formed the basis for treating his case similarly to others involved in the Tax Scheme.

[34] The only mention in the Second Decision of any consideration of the CRA's failure to disclose the documents sought by the Applicant is this:

You also state that you have been requesting to have access to your information on file for years, without any success. Although I

acknowledge this delay, the information requested by you, does not pertain to your relief request as we have enough information to make a decision.

[35] This treatment of the Applicant's disclosure request reveals an erroneous view of the purpose of disclosure by an administrative decision maker. The duty to make proper disclosure extends beyond the CRA's own interests. The CRA has a duty to disclose information so that the Applicant may know the case he has to meet in advance of the Second Review and to be able to respond to it (*Canadian Pacific* at para 41). Had such disclosure been made, the Applicant may have been in a better position to respond to the concerns of the CRA identified in the First Decision. This disclosure was made all the more necessary by the brevity of the First Decision which provide no analysis and failed to respond to the Farber Submissions.

[36] A proper disclosure would have included, at a minimum, the entirety of the internal documents used to determine the First Decision (since the Second Reviewer conducts a "review of the file to date"), including documents that show whether the Applicant's case was treated in the same way as others involved in the Tax Scheme.

[37] I pause to note that the jurisprudence is split on whether the Fact Sheet forms part of a tax decision. For example, *1680169 Ontario Limited v Canada (Attorney General)*, 2019 FC 562 at paragraph 12 holds that the Fact Sheet is part of the decision, whereas *Robinson v Canada (National Revenue)*, 2018 FC 825 at paragraph 42 holds that it is part of the underlying record. Regardless, the case law is consistent in holding that the Fact Sheet may be consulted to understand the reasons for a tax decision. It follows that they should be disclosed at the same time as the decision.

B. *Is the Decision Reasonable?*

[38] The CRA's decision to provide interest relief under subsection 220(3.1) of the *Act* is a discretionary one. Admittedly, it is not the function of a court on review of the exercise of ministerial discretion to engage in the reweighing of relevant factors. As Justice Iacobucci held in *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at 607, a reviewing court should not disturb a decision based on a broad discretion unless the tribunal has "made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner."

[39] I find that the CRA made two such errors that render the Second Decision unreasonable.

(1) *The Second Reviewer failed to consider CRA conduct*

[40] Paragraph 26 of the Guidelines states that the interest may be waived or cancelled if it resulted mainly because of actions of the CRA. Those delays include processing delays, delays in providing information and "undue delays" in resolving an objection.

[41] In considering the issue of delay associated with the Applicant's Notice of Objection (which took more than 7.5 years between July 24, 2007 and February 3, 2015 to resolve), the Second Decision states:

In regards to delays with your reassessments and objections ... it is your choice to object to a tax/reassessment. The timeframe it takes to complete an objections depends on the complexity of the objection. Objections which involve tax shelters are considered to

be more complex. The CRA cannot guarantee how long an objection will take to complete.

[42] The Fact Sheet adds:

As the reassessments occurred within our three year limit and it is the taxpayer's choice to object to tax assessment/reassessment, it has been determined that there were no delays on the part of the CRA.

[43] The suggestion that there were no delays on the part of the CRA in dealing with the Applicant's Notice of Objection because it is the choice of a taxpayer to object shows a failure on the part of the Second Reviewer to consider and give effect to a key element of the Guideline's text. Subparagraph 26(f) of the Guidelines recognizes "undue" delays in resolving an objection as a basis for waiving or cancelling interest arrears. Either the Second Reviewer failed to consider this element of the Guidelines, which is unreasonable in the circumstances (*Vavilov* at para 122), or the Second Reviewer truly found no delay, which reflects a capricious exercise of discretion.

(2) *The Second Decision fails to address the Applicant's central arguments*

[44] In considering the issue of delay, the CRA also failed to respond to the central arguments made in the Farber Submissions and the Applicant's Delay Submissions that: (i) the delay in dealing with the Applicant's objection was the main cause of the interest accrual between 2007 and 2018; (ii) the time it took the CRA to process the Applicant's objection was outside normal processing times; and (iii) to the extent that the delay in deciding the Applicant's objection was

caused by the CRA's choice to await for the resolution of events related to other taxpayers, this was an improper exercise of its discretion (citing *Ficek v Attorney General*, 2013 FC 502).

[45] I therefore find that the Second Decision lacks justification and transparency in failing to account for the central issues and concerns raised by the Applicant (*Vavilov* at paras 127 and 128).

C. *Was the Second Reviewer biased?*

[46] The Applicant believes that he has not been treated in the same way that “ultra-rich” taxpayers are treated and that the CRA does not administer tax legislation in a consistent and fair manner across taxpayer groups. This is an allegation of bias.

[47] Procedural fairness requires that decisions be made free from a reasonable apprehension of bias on the part of decision makers (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 45). The threshold for establishing a reasonable apprehension of bias is a high one (*R v RDS*, [1997] 3 SCR 484 at para 113) and requires that the Applicant show that a reasonable and informed person, viewing the matter realistically and practically—and having thought the matter through—would conclude that it is more likely than not that the decision maker, whether consciously or not, would not decide the matter fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394).

[48] The Applicant has not met the test for bias. Not only are the Applicant's allegations directed at the CRA generally and not the Second Reviewer, but the Applicant's allegations are unsupported and highly speculative.

D. *Did the CRA breach of the Taxpayer Bill of Rights?*

[49] The Applicant argues that the CRA breached the Taxpayer Bill of Rights by failing to provide him with accurate and timely disclosure and failing to administer the tax code equally across taxpayer groups. These arguments are duplicative of the Applicant's procedural fairness arguments. In any event, this Court has no power to enforce the Taxpayer Bill of Rights which is nothing more than a service pledge with no force of law (*Johnson v The Queen*, 2022 TCC 31 at para 25).

VII. Conclusion

[50] The Second Decision was rendered in a manner that was procedurally unfair to the Applicant and is unreasonable. Accordingly, this application for judicial review is granted; the matter shall be remitted back to a different Taxpayer Relief Officer who is directed to reconsider the Applicant's Request for Taxpayer Relief in accordance with these reasons. Given the parties' divided success, there shall be no order as to costs.

JUDGMENT in T-329-24

THIS COURT'S JUDGMENT is that:

1. The style of cause shall be amended to name the Attorney General of Canada as the proper respondent to this proceeding.
2. The application for judicial review is granted.
3. The matter is returned for redetermination by a different decision maker in accordance with the reasons herein; and
4. There is no order as to costs.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-329-24

STYLE OF CAUSE: ROGER MALONEY v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 11, 2024

JUDGMENT AND REASONS: WHYTE NOWAK J.

DATED: SEPTEMBER 19, 2024

APPEARANCES:

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FOR THE RESPONDENT